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Supreme Court, U.S.
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No. 97-679

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

AT&T CORP.,

Petitioner,

v.

CENTRAL OFFICE TELEPHONE, INC.,

Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit correctly concluded that a jury verdict for intentional interference with business relationships and for breach of contract, based on willful misconduct by a long-distance telecommunications carrier in seeking to eliminate a competitor, was not in this case related to rates or rate-setting, such that the filed rate doctrine did not apply?

LIST OF PARTIES AND AFFILIATES

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Central Office Telephone, Inc. ("COT") is a reseller of long-distance telecommunication services. Resellers are firms that purchase "bulk" long-distance services from carriers and resell them to their own customers. They qualify for volume discount plans by aggregating the business of multiple customers who would not individually qualify for volume discounts. The reseller is the customer of the long-distance carrier, as well as its competitor, and the end users are the customers of the reseller.

In the fall of 1989, COT became aware of the opportunity to resell AT&T's "Software Defined Network" ("SDN") service to its customers. Ninth Circuit Excerpt of Record (hereinafter "ER") 365-66. SDN is a virtual private network service that allows an AT&T customer, in consideration for a commitment to purchase large volumes of minutes of long distance usage, to receive substantially higher discounts than provided for other available AT&T long-distance services. ER 589-90, 2529, 3526, 3545, 3021-23.

COT developed a business plan to include the addition of salesmen, telemarketing and expansion into other states, and on October 30, 1989 signed an agreement letter memorializing COT's selection of SDN Expanded Volume Program Plan 2, under which COT would receive up to a 20% discount off basic SDN rates in exchange for a

renewable commitment to purchase 2 million minutes annually. ER 405, 4396, 4447, 416, 3721-24, 2336-37, 431, 4515-16. COT also selected the SDN Multiple Location Billing Option under which AT&T would bill up to 6,000 of COT's SDN service locations at no extra charge. ER 414-16.

When COT began selling SDN services it immediately experienced provisioning delays. Due to these problems, AT&T suggested that COT "park" its customers under a new and different service known as Multi-Location Calling Plan ("MLCP"). ER 418-21. Its stated purpose was to serve COT's customers' long-distance needs until they could be provisioned onto SDN. This service commenced on March 8, 1990. ER 417, 3737-38A.

On April 9, 1990, AT&T informed COT that its first account had been placed onto the SDN. ER 432. Believing that its SDN was now functional, COT upgraded its SDN subscription to Plan 6, which offered a larger discount (up to 25%) in exchange for a larger volume commitment (15 million minutes annually). ER 4037.

Unbeknownst to COT, on or about March 1, 1990, AT&T, through an Ad Hoc Committee formed to "kill" the arbitrage by which resellers conducted their business, initiated multiple strategies to discourage resale (set forth below). ER 1222, 1238-39, 3415, 3735-36, 3739-41, 3743. After COT signed the April 9 contract and continuing until September 30, 1992, when COT canceled its SDN contract with AT&T to avoid going out of business (ER 1942), COT and its customers experienced, among other things, transferred accounts (ER 440-43, 599-600, 1686, 3379),

decreased service (ER 441-42, 1838-39, 1891, 2577, 3149, 3647), slow or non-existent provisioning of both SDN and MLCP orders (ER 458-59, 1277, Ninth Circuit Supplemental Excerpt of Record (hereinafter "SER") 33), lost orders (ER 423), limited calling card service (ER 401-03, 748-50), discount misallocation between COT and its customers (ER 968, 1754-55, 468-69, 471, 1709, 2670, 4171, 4180, 1762, 2600-01, 2672-73), incorrect billing (ER 481-84), untimely call detail billing (ER 451-52, 1405, 1895, 2676-77), delayed billing (ER 738, 4308), and "slamming" of customers (ER 746, 1877, 4278-96). As of the termination date, COT had lost over 75% of its customer base. ER 3085.

II. PROCEEDINGS BELOW

On June 27, 1994, in the United States District Court for the District of Oregon, a jury found AT&T liable for willful misconduct in breaching its contract with COT, and intentional interference with COT's contracts with its customers. App. 1. The jury awarded COT damages against AT&T in the amount of $13,000,000. App. 2.

On November 9, 1994, the district court granted in part and denied in part AT&T's motion for judgment as a matter of law. ER 4771-90. The district court found that COT's evidence with respect to damages was not sufficiently grounded in objectively verifiable facts after 1992, when COT was forced by AT&T's conduct to terminate the contract, and reduced the damages award to reflect that decision. The district court determined that the proper amount of damages was $1.154 million. (The issues raised by the district court's reduction of COT's

$13 million verdict to a $1.154 million judgment are the subject of a separate petition for a writ of certiorari filed by COT.)

COT appealed from the district court's partial grant of judgment as a matter of law on several grounds. AT&T also appealed from the judgment against it.

On February 26, 1997, the United States Court of Appeals for the Ninth Circuit affirmed COT's judgment against AT&T. However, it reversed the district court's decision not to submit punitive damages evidence to the jury and remanded the case for trial on the issue of punitive damages. It also affirmed the district court's decision with regard to its partial grant of AT&T's motion for judgment as a matter of law. Central Office Telephone, Inc. v. American Telephone and Telegraph Co., 108 F.3d 981, 990-991, 993-994 (9th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3308 (U.S. Aug. 27, 1997) (No. 97-656) and petition for cert. filed, 66 U.S.L.W. 3308 (U.S. Oct. 16, 1997) (No. 97-679).

III. AT&T's MISSTATEMENTS OF THE CASE

AT&T presents a version of this case that bears little resemblance to the case that was actually tried to the jury. AT&T continually refers to COT's claims as mere contract claims seeking to enforce "side deals." This is a highly inaccurate description. It is difficult to discern it from AT&T's rendition of the facts, but this case concerns some very bad conduct by AT&T. AT&T's sanitized version of the case conceals most of the unpleasant (to

AT&T) evidence, and it also ignores that the Ninth Circuit has remanded for a trial on punitives.

COT's claims did not seek to enforce "side deals" for expedited service, as AT&T suggests. Rather, COT proved that it had suffered damages due to AT&T's intentional interference with COT's business relationships with its customers and other willful misconduct. COT's proof included the following:

(1) AT&T initially overpromoted the use of SDN by long-distance resellers to bolster its decreasing revenues in the late 1980s, and to wrestle business from MCI and other carriers. ER 1183-89. However, AT&T then realized that resellers could become formidable competitors to AT&T, and it adopted a corporate policy to "kill arbitrage" by resellers. ER 3735, 1203, 1206, 1219, 1222.

(2) AT&T formed an Ad Hoc Committee to implement this policy by establishing "roadblocks" to the use of SDN with the purpose of eliminating resellers. ER 3736, 1238, 1249-52, 3739-41, SER 27.

(3) One "roadblock" implemented by AT&T was to provision SDN for resellers at a glacial pace. As an AT&T executive said internally, "with a one percent provisioning rate [resellers] won't be around much longer." ER 1277.

(4) AT&T also had its telemarketers contact COT's SDN customers and, without authorization,

convert them into regular AT&T long-distance service, a practice known as "slamming." ER 746, 1579, 1877, 4278-96.

(5) AT&T failed to implement MLCP orders that COT submitted and failed to advise that it had not done so until several months later, by which time COT's customers had departed. ER 423, 1664, 2612, 4205-06, 738.

(6) AT&T delivered bills to COT's customers allocating to them 100% of COT's discount, so that COT would not receive any revenues. ER 968, 1754, 468-69, 471, 1709.[1]

(7) AT&T adopted a policy against allowing cash payments due to COT and other resellers

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[1] AT&T contends before this Court that its obligations related to billing services are governed exclusively by its tariff and the Federal Communications Act ("FCA"). In International Audiotext Network, Inc. v. American Tel. & Tel. Co., 893 F. Supp. 1207 (S.D.N.Y. 1994), aff'd, 62 F.3d 69 (2nd Cir. 1995), AT&T contended just the opposite. There, the Court ruled in favor of AT&T that FCA Sections 201 and 202 did not apply to billing services furnished by AT&T, since Title II of the FCA regulates communications services, and billing services that do not use communications over the carrier's wire or radio facilities are not communications services. 893 F. Supp. at 1223-24, citing, Matter of Detariffing of Billing & Collections Servs., 102 F.C.C.2d 1150, 1168 (1986); Matter of AT&T 900 Dial-It Services and Third Party Billing and Collection Services, 4 F.C.C. Rcd. 3429 (1989). Consistent with these authorities, an AT&T expert testified that AT&T's Multi-Location Billing services were not covered by its tariff. ER 1767, 1774. The AT&T expert likewise testified that the SDN tariff contains no terms pertaining to provisioning. ER 1774.

resulting from other AT&T discounts, with the purpose to "kill the resellers' cash flow." ER 1344, 3739-41.

(8) AT&T did not bill COT's customers for months after they were using COT's services, through a practice known as "suppressed" billing. ER 517, 1898-99. This not only suspended payments that were due to COT, it also made COT's customers irate and unwilling to pay what was due. ER 488, 1576, 4263, 4308, 524-26, 4308.

(9) AT&T denied COT and other resellers SDN calling cards, account teams, and SDN User Association memberships (which AT&T reserved for its Fortune 500 clients), and blocked international calling card calls. ER 748-50, 403, 440-42, 696-97, 753-55, 830, 1837-40, 1874-75, 2577.

(10) AT&T refused to respond to COT's pleas to address these and other problems (ER 486, 516), and AT&T personnel demonstrated AT&T's antipathy toward COT and other resellers by the epithets they used to describe them. AT&T managers referred to resellers as "cockroaches," "slime," and "convicts." ER 3405.

(11) After placing COT in the midst of these problems, AT&T forced it to cease dealing with local AT&T representatives to attempt corrections, but instead transferred its account to AT&T's Channel Development and Operations Center ("CDOC") in New Jersey, where

AT&T promised even poorer service.[2] ER 1837-40, 3149, 440-42, 1890-91.

Through these and other "roadblocks," AT&T nearly drove COT out of the reseller business. To survive, COT was forced to terminate its contract with AT&T in September 1992, with one and one-half years remaining on the contract. ER 1942, 481-86, 515-17.

This is the case that was actually tried to the jury. It did not involve a mere failure to provide expedited services, nor did it involve any secret "side deals."

REASONS FOR DENYING THE WRIT

1. AT&T's petition nearly ignores that it was found to have engaged in willful misconduct. It also suggests that the Ninth Circuit did not base its decision on AT&T's willful misconduct, even though the Ninth Circuit remanded the case for a trial on punitive damages. Once these omissions and misstatements are corrected, AT&T's filed rate doctrine argument evaporates. Even if AT&T's tariff exclusively governed the parties' relationship, it expressly allows for the claims at issue.

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[2] AT&T kept this promise. AT&T employees at CDOC were not trained and CDOC was not staffed to meet the SDN demands that followed AT&T's overpromotion. ER 1188-89, 1193, 1290, 1639, 2730-32, 2775, 2801. For example, several weeks after COT had been sending orders to CDOC, an AT&T supervisor finally called to ask "who Central Office Telephone was, and what in the world was all this paper [it was sending to New Jersey]." ER 1847. He then flatly stated that he "would not process [COT's] MLCP orders." ER 1848.

AT&T's tariff states: "The company's liability, if any, for its willful misconduct is not limited by this tariff." ER 4487. To the extent that the tariff applies, this case was tried precisely in accordance with its terms, and the jury found that AT&T had engaged in willful misconduct. AT&T concedes that there is no limitation on its liability for willful misconduct. AT&T's Petition for Centiorari 5.

For over a century, carriers have been prohibited from limiting their liability by tariff for claims based on willful misconduct. Primrose v. Western Union Tel. Co., 154 U.S. 1, 14 S. Ct. 1098 (1894). This fundamental principle predates and overrides any protections AT&T can garner from the filed rate doctrine. Courts have on several occasions held that willful misconduct claims are not precluded by the doctrine. See MCI Telecommunications Corp. v. TCI Mail, Inc., 772 F. Supp. 64 (D.R.I. 1991)(citing cases).[3]

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[3] The exception has been Marco Supply Co., Inc. v. AT&T Communications, Inc., 875 F.2d 434 (4th Cir. 1989). There, Marco Supply alleged that it had contracted with AT&T based on quotations of certain rates, which were substantially less than the amounts AT&T ultimately charged. The trial court dismissed Marco Supply's claims for breach of contract and willful misrepresentation based on the filed rate doctrine, and the Fourth Circuit affirmed. That decision has been criticized for its lack of analysis and for applying "blindly the doctrines that were spawned by the ICA." MCI Telecommunications Corp. v. TCI Mail, Inc., 772 F. Supp. at 68. Moreover, Marco Supply is distinguishable from this case in any event. The willful misconduct at issue in Marco Supply involved nothing but rates. Here, AT&T's willful misconduct did not relate to rates. In addition, Marco Supply's willful misrepresentation claim required proof of reasonable reliance. The court found that element to be lacking, since Marco Supply was

The filed rate doctrine does not protect AT&T from willful misconduct claims. Even if AT&T's tariff wholly defined the parties' relationship - which it did not - AT&T's tariff specifically preserves such claims.

2. To fashion this as a filed rate case, AT&T argues that COT wanted better or faster service than required by AT&T's tariff. It then parades several cases stating that rates filed by carriers are the only lawful charges. However, COT's claims do not challenge AT&T's rates, nor do they seek to enforce "side deals" for services not covered by AT&T's tariff. COT did not demand specialized services. Instead, while COT paid the same rates as AT&T's favored corporate customers, COT was offered services intentionally designed to be so defective as to put COT out of business and thus eliminate it as a reseller.

While the filed rate doctrine is "not limited to 'rates' *per se*," Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953, 966, 106 S. Ct. 2349 (1986), it must have something to do with rates or rate setting. As the Ninth Circuit recognized in this case, not everything that a carrier inflicts upon a customer is sufficiently related to rates to bar common law remedies. This Court's decision in Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 96 S. Ct. 1978 (1976), demonstrates this point.

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presumed to know the published tariff rate. 875 F.2d at 436. Here, COT's claims have nothing to do with a misquoted rate or a misrepresentation as to rates. Reasonable reliance, found to be lacking in Marco Supply, is not an issue here.

In Nader, an airline passenger brought fraud claims against an airline arising from the airline's failure to apprise the passenger of its deliberate overbooking practices. This Court held that allowing a common law remedy in this situation did not create a conflict with the Federal Aviation Act's scheme for rate setting:

> The court in the present case, in contrast [to Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S. Ct. 350 (1907)], is not called upon to substitute its judgment for the agency's on the reasonableness of a rate -- or, indeed, on the reasonableness of any carrier practice. There is no Board requirement that air carriers engage in overbooking or that they fail to disclose that they do so. And any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be merely incidental.

426 U.S. at 299-300.

AT&T likewise oversold its SDN services, and failed to disclose that it had done so. More significantly, AT&T subsequently changed its policy and intentionally implemented "roadblocks" to the resale of SDN, again without disclosure. There is no Federal Communications Commission ("FCC") requirement relating to either of these practices. Finally, as in Nader, any impact on rates that may result from the imposition of liability in this case would be merely incidental.

The Ninth Circuit reached a decision in this case that is entirely consistent with Nader.[4] It correctly concluded that COT's claims did not create a conflict with the FCA's statutory scheme, since they did not relate to rates or rate setting. The Ninth Circuit's decision was a fact-based decision that does not denigrate the filed rate doctrine, but finds it inapplicable under the particular facts involved.

3. The principal decisions of this Court that are relied upon by AT&T are Chicago & Alton R. Co. v. Kirby, 225 U.S. 155, 32 S. Ct. 648 (1912), Atchison, T. & S. F. Ry. Co. v. Robinson, 233 U.S. 173, 34 S. Ct. 556 (1914), and Davis v. Cornwell, 264 U.S. 560, 44 S. Ct. 410 (1924), all of which predate Nader by at least 50 years[5]. AT&T

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[4] The Ninth Circuit's decision is also consistent with previous Ninth Circuit decisions and decisions from other circuits. See Columbia Steel Casting Co. v. Portland General Elec. Company, 103 F.3d 1446 (9th Cir. 1996), as amended on denial of rehearing, 111 F.3d 1427 (1997), petition for cert. filed, 66 U.S.L.W. 3085 (U.S. Jul. 2, 1997) (No. 97-49); In re Lower Lake Erie Iron Ore Anti Trust Litigation, 998 F.2d 1144, 1159 (3rd Cir. 1993); Pacific S.S. Co. v. Cackette, 8 F.2d 259, 261 (9th Cir. 1925), cert. denied, 269 U.S. 586 (1926)(rejecting carrier's tariff-based defense on ground that customer's tort claim had "no perceptible relation to rates.") Subsequent decisions have also cited the opinion below with approval for the rather obvious proposition that where the claim at issue does not involve rates or rate-setting, the filed rate doctrine does not apply. County of Stanislaus v. Pacific Gas and Elec. Co., 114 F.3d 858, 865 (9th Cir. 1997); Swain v. AT&T Corp., No. CIVA3:94-CV-1088-D, 1997 WL 573464 (N.D. Tex., Sept. 9, 1997).

[5] Moreover, all of these decisions follow Texas & Pacific R. Co. v. Abilene Cotton Oil Co., which this Court found to be consistent with its decision in Nader. 426 U.S. at 299-300.

contends that these cases bring virtually every aspect of a carrier's services within the scope of the filed rate doctrine. However, these cases did not go that far. They each involved a customer who paid one tariff rate while claiming services that were not required by that tariff. In effect, these customers sought to pay a lower rate for services due under a separate tariff.

Here, COT paid the same rates as AT&T's other customers for the same services. While AT&T provided those services to its "high end customers," it provided COT with services intentionally designed to be so defective as to put COT out of the reseller business. This has nothing to do with AT&T's rates or even the relationship between a particular rate and a particular service.

The only relationship to rates that AT&T has been able to identify is based on the cost that AT&T will incur to satisfy COT's judgment. However, the fact that AT&T may attempt to pass this cost on to its customers through higher rates is not a sufficient relationship to rates to bring the filed rate doctrine into play. Nader expressly states that such an effect on rates is too attenuated. 426 U.S. at 300.

AT&T also argues that allowing a damages claim results in a disguised rebate favoring one of its customers, which the filed rate doctrine was designed to prevent. However, this Court has held that the potential for disguised rebates is not a sufficient reason to abolish claims of a customer who is truly damaged by a carrier's conduct. Chicago & N.W. Ry. Co. v. Lindell, 281 U.S. 14, 18, 50 S. Ct. 200 (1930); see also Southern Pacific Co. v. Miller Abattoir Co., 454 F.2d 357, 360-61 (3rd Cir. 1972) ("The

Railroad's argument overlooks the fact that a customer who is truly damaged by a railroad's breach of its shipping contract, whether the breach be intentional or not, receives no 'rebate' when the railroad pays it for the amount of its loss.")

The Ninth Circuit correctly concluded that this case does not involve rates, rate-setting, or practices or privileges affecting charges specified in AT&T's tariff. The filed rate doctrine therefore does not apply

4. Finally, the filed rate doctrine does not preempt COT's common law claims because the right to prove such claims is specifically preserved by the savings clause of the FCA, 47 U.S. C. § 414. It provides:

> Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Nader interpreted a similar savings clause as preserving a passenger's common law claim for fraud based on an airline's failure to disclose its overbooking practices. On the basis of 47 U.S.C. § 414 and the Nader decision, courts have held that common law claims asserted against telecommunications carriers are not preempted by the FCA. See, e.g., In re Long Distance Telecommunications Litigation, 831 F.2d 627, 633-64 (6th Cir. 1987); Financial Planning Institute, Inc. v. American Tel. & Tel. Co., 788 F. Supp. 75, 77 (D. Mass. 1992); Cooperative Communications, Inc. v. AT&T Corp., 867 F. Supp. 1511,

1516 (D. Utah 1994); ("[I]nclusion of the savings clause clearly indicates Congress' intent that independent state law causes of action, such as interference with contract . . . not be subsumed by the Act, but remain as separate causes of action.").

Judge Brunetti, who authored the dissent in the Ninth Circuit's decision below, reached the same conclusion in Allarcom Pay Television, Ltd. v. General Instrument Corp., 69 F.3d 381 (9th Cir. 1995). There, the defendants raised express and implied preemption under the FCA as a defense to claims for interference with contract and with prospective economic advantage. In rejecting this defense, Judge Brunetti relied on a savings clause within the FCA substantially similar to the savings clause at issue here. He concluded that there was no preemption because allowing the state law claims would not impose obligations inconsistent with the FCA, nor would it frustrate any congressional objective. 69 F.3d at 387.

If the language and intent of the FCA itself did not permit exclusion of the claims at issue in Allarcom, particularly where an express preemption clause was involved, it logically follows that the judicially-created filed rate doctrine should not bar such claims. Allowing such claims would not create obligations inconsistent with the FCA. To the contrary, as Judge Brunetti stated in Allarcom, "[t]he obligations imposed under state law causes of action for unfair competition, interference with contract, and interference with prospective economic advantage are in addition to FCA obligations." 69 F.3d at 386.

5. One additional point needs to be made, to correct a misimpression that has been conveyed by AT&T. The filed rate doctrine is not threatened by the Ninth Circuit's decision in this case. The Ninth Circuit's decision in this case is consistent with the doctrine, for the reasons stated above. Rather, the filed rate doctrine is today almost extinct because the body of law that gave rise to the doctrine is rapidly disappearing. The dissent in Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 138, 110 S. Ct. 2759 (1990), recognized this trend nearly eight years ago.[6]

Specifically with respect to this case, the Telecommunications Act of 1996 was enacted on February 8, 1996. Pub. L. 104-104, 110 Stat. 56. Under its provisions, the entire field of telecommunications law is being transformed, including as to tariffs.

Section 401 of the Telecommunications Act of 1996 (Pub. L. 104-104 § 401, 110 Stat. 128-129), adding Section 160(a)(1) to the FCA (47 U.S.C. § 160(a)(1)), requires the FCC to forbear from applying any regulation or any provision of the FCA to a telecommunications carrier if the FCA determines that (1) enforcement is not necessary to ensure that charges, practices, classifications or regulations by the carrier are just and reasonable, (2) enforcement is

[6] "[T]he majority fails to appreciate the significance of the 'sea change' in the statutory scheme that has converted a regime of regulated monopoly pricing into a highly competitive market. Even wearing his famous blinders, old Dobbin would see through the tired arguments the Court accepts today." 497 U.S. at 138 (Stevens, J., dissenting).

not necessary for the protection of consumers, and (3) forbearance is consistent with the public interest. In its Policy and Rules Concerning the Interstate Interexchange Marketplace (CC Docket No. 96-61), FCC 96-424 (rel. October 31, 1996), 61 Fed. Reg. 59340 (November 22, 1996)(the "Detariffing Order"), the FCC ordered non-dominant interexchange carriers to cancel all tariffs for interstate, domestic, interexchange services currently on file with the FCC, and prohibited nondominant interexchange carriers from filing tariffs for such services in the future. 61 Fed. Reg. at 59353.[7] The FCC states as follows in support of the Detariffing Order:

> We find that a regime without nondominant interexchange carrier tariffs for interstate, domestic, interexchange services is the most procompetitive, deregulatory system. Specifically, we find that not permitting nondominant interexchange carriers to file tariffs with respect to interstate, domestic, interexchange services will enhance competition among providers of such services, promote competitive market conditions, and achieve other objectives that are in the public interest, including eliminating the possible invocation of the filed rate doctrine by nondominant interexchange carriers, and establishing

[7] Previously on October 23, 1995, the FCC issued an order granting AT&T's motion to be reclassified as a nondominant carrier. Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, FCC 95-427 (rel. October 23, 1995), recon. pending.

> market conditions that more closely resemble an unregulated environment. Moreover, we find that permitting non-dominant interexchange carriers to file tariffs on a voluntary basis would undermine several of these benefits, and therefore is not in the public interest.[8]

61 Fed. Reg. at 59349 (emphasis added).

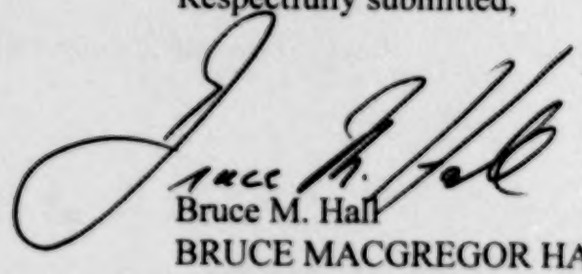
In short, the "century of decisions" on the filed rate doctrine relied upon by AT&T is about to become ancient history. The FCC wants to eliminate tariffs for non-dominant telecommunications carriers, and Congress has enacted a statute that allows the FCC to do so under circumstances the FCC now believes to exist.

[8] MCI Telecommunications Corp., joined by AT&T, has obtained a stay of the mandatory detariffing portion of the Detariffing Order pending judicial review of the order. MCI v. FCC, No. 96-1459 (D.C. Cir. Feb. 13, 1997). App. 3 - 43.

CONCLUSION

For the reasons given above, AT&T's petition for a writ of certiorari should be denied.

Respectfully submitted,



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APPENDICES

FILED 94 JUN 27

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC., Plaintiff,	) Civil No. 91-1236-JE
AMERICAN TELEPHONE & TELEGRAPH COMPANY, Defendant.	) VERDICT

We, the jury, being duly empaneled and sworn to try the issues in this case, return our verdict as follows:

1. On plaintiff COT's claim for Breach of Contract we find:

(✓) In favor of plaintiff COT.

____ In favor of defendant AT&T.

2. On plaintiff COT's claim for Intentional Interference with business relations we find:

(✓) In favor of plaintiff COT.

_____ In favor of defendant AT&T.

If you find in favor of COT on either of the above claims, answer question 3.

3. Damages are awarded to COT against AT&T in the amount of $(13,000,000.00)

* * * * * * * * * * * * * *

4. On defendant AT&T's counterclaim, we find:

_____ In favor of AT&T, and award damages in the amount of $_____.

(✓) In favor of COT.

Dated this (29th)of June, 1994.

(Linda C. Fitz-Armstrong)
Presiding Juror

FILED JAN 6 1997

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MCI TELECOMMUNICATIONS CORPORATION, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	)	No. 96-1459

MOTION FOR STAY PENDING JUDICIAL REVIEW AND FOR EXPEDITED CONSIDERATION AND A BRIEFING SCHEDULE

MCI Telecommunications Corporation ("MCI") requests that this Court stay the portions of the Second Report and Order ("Order") issued by the Federal Communications Commission ("FCC") in Policy and Rules Concerning the Interstate Interexchange Marketplace, CC

Docket No. 96-61, released October 31, 1996, 61 Fed. Reg. 59,340 (Nov. 22, 1996) (copy attached at Tab A), which prohibit nondominant interexchange carriers from filing tariffs for domestic interstate interexchange common carrier services. MCI also requests that this Court expedite its review of the Order and establish a briefing schedule.

MCI requests this relief because the Order totally transforms the nature of customer-carrier relationships in the interexchange market in a way that will impose enormous costs and generate widespread, debilitating confusion about the laws and rules that will govern those relationships. Specifically, the Order eliminates all domestic tariffs, and requires carriers to establish individual contractual relationships with each and every customer of all domestic services. Indeed the Order eliminates tariffs even for customers with whom it will be impossible to form

contracts -- so-called casual callers who are not presubscribed to a carrier's service.

For carriers such as MCI, the cost of moving from tariffs to contracts for all domestic customers will be enormous. See Affidavit of Victoria Harker, January 6, 1997, ¶¶ 4-11 (attached at Tab B) (detailing costs of compliance). At the same time, the legal status of those newly formed contractual relationships will remain in substantial doubt during the pendency of appellate review. The Order itself generates substantial confusion as to whether the terms of these contractual relationships are governed by the substantive requirements of federal law (47 U.S.C. §§ 201, 202) (as the Order in some places suggested) or the requirements of state law (as the Order elsewhere suggests). At a minimum, there is likely to be a

plethora of litigation contesting the adequacy of the process of contract formation with MCI's millions of customers.

Should the Order be invalidated, the carrier-customer relationship will once again be governed exclusively by tariff. Individual contracts (principally with large business customers) with rates that differ from the tariffed rates will presumably be invalid and potentially unlawful. Thus, a second wave of litigation is likely in the event the Order is invalidated. Because the Order works so fundamental a change in prevailing law and practice -- and imposes such enormous cost and uncertainty -- its implementation should await a final determination of its validity.

A stay to prevent these harms is particularly warranted because the Order fails to provide anything approaching a sufficient justification for eliminating tariffs.

Section 203 of the Communications Act requires interexchange carriers to file tariffs with the FCC. 47 U.S.C. § 203(a). The FCC invokes § 402 of the Telecommunications Act of 1996, (codified at 47 U.S.C. § 10) as authority to forbid the filing of such tariffs. But this provision cannot support mandatory detariffing. While that provision may give the FCC authority to refrain from enforcing § 203's tariff requirements, it does not authorize the further step of affirmatively prohibiting carriers from filing tariffs should they wish to do so.

Moreover, even if the FCC did have the authority to forbid tariff filings, none of the rationales advanced by the FCC provides a reasoned basis for doing so. The FCC's principal rationale -- that eliminating tariffs will minimize collusion and price-signalling in the interexchange market -- is entirely undermined by a requirement imposed

elsewhere in the Order that carriers make the same information about rates, terms and conditions available to the public at the carriers' offices. see Order ¶¶ 59, 85. Thus, all the FCC has done is change the location where this information is available to the public.

The other rationales offered by the FCC likewise cannot support mandatory detariffing. The Order asserts that mandatory detariffing promotes rapid efficient responses to changes in demand and cost, eliminates costs on carriers seeking to offer new services, and allows consumers to seek out new arrangements tailored to their individual needs. Order ¶ 53. But all of these alleged benefits could have been achieved by permissive detariffing (which MCI, other carriers, consumer groups, and NARUC advocated to the FCC), with none of the costs imposed by

mandatory detariffing. Thus, none of these rationales justifies the choice of mandatory detariffing.

Immediate relief is needed. As of its effective date of December 22, 1996, the Order forbids carriers from filing any new tariffs or amending existing tariffs for long-term customer arrangements. Order ¶ 90. Prior to the Order's effective date, MCI filed approximately 300 such tariffs each month. Thus, the Order is having significant disruptive effects now which fully justify a stay. Furthermore, the Order requires replacement of all domestic tariffs with individual contracts by no later than September 22, 1997 (nine months after its effective date). Because the process of converting tens of millions of individual customers from contract to tariff will take months, that process will have to commence soon. See Harker Aff. ¶ 3. It is extremely unlikely that briefing,

argument and a final decision from this Court can be completed before all carriers will have to undertake that burden. Therefore, a stay of the entire Order is fully justified.

Additionally, because the public interest (as well as the interests of MCI and other carriers) will be greatly served by a swift final resolution of this matter, MCI respectfully requests a briefing schedule that would permit a final decision to be rendered no later than June 1, 1997.

STATEMENT

The FCC's Notice of Proposed Rulemaking proposed that the FCC would exercise its authority under Section 10 of the Telecommunications Act of 1996 to forbear from enforcing Section 203 of the Act, which requires carriers to file with the Commission schedules of charges (and classifications, practices and regulations

affecting such charges).[1] The FCC identified two alternatives: "permissive detariffing," a rule which would permit but not require carriers to file tariffs; or "mandatory detariffing," a rule which would prohibit carriers from filing tariffs altogether.

In its comments, MCI advocated permissive detariffing and vigorously opposed mandatory detariffing. MCI was joined in this position by other carriers (including AT&T), consumer groups, and NARUC. Comments filed by these parties demonstrated that mandatory detariffing would impose significant costs on carriers and their customers, with no countervailing benefits that could not equally be achieved through permissive detariffing. The

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[1] Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 12934, as amended, CC Docket No. 96-61, Notice of Proposed Rulemaking, 11 FCC Rcd. 7141, released March 25, 1996 ("Notice").

record showed that mandatory detariffing, especially as applied to services offered to residential and small business customers, would impose enormous transaction costs on carriers and their customers, and could preclude "casual" calling altogether.[2]

The FCC nevertheless chose "mandatory detariffing." The FCC concluded that such a policy would prevent carriers from invoking the filed rate doctrine, and protect consumers by allowing them "to pursue remedies under state consumer protection and contract laws." Order ¶ 55. The FCC also found that mandatory detariffing would likewise "preserv[e] the reasonable commercial expectations" of carriers (id.). The FCC claimed that tariffs are not "the only feasible way for carriers to establish legal

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[2] See AT&T Reply Comments, CC Docket No. 96-61, filed May 24, 1996, at 3 (citing comments of other parties).

relationships with their customers" (id.); that nondominant carriers would "not necessarily" need to negotiate contracts for service with each individual customer (id.); and that carriers could, for example, issue "short standard contracts" that contained basic rates, terms and conditions and "cross-referenced" other documents (id.). The FCC also stated that it was "not persuaded that detariffing will make casual calling impossible," and that "carriers have other options to establish legal relationships" for such calling (id., ¶ 58). The FCC therefore ordered nondominant carriers to cancel their tariffs for domestic, interstate services as of nine months from the Order's effective date. In addition, the FCC prohibited nondominant carriers from filing new or revised tariffs for long-term service arrangements (¶ 90).

MCI sought a stay of the Order from the FCC on December 18, 1996. Consumer groups, including the

Consumer Federation of America and the Telecommunications Research and Action Center, supported MCI's stay request. To date, the FCC has not ruled on that request.

ARGUMENT

A stay should be granted where 1) the movant is likely to prevail on the merits of the appeal; 2) the movant will likely suffer irreparable harm absent a stay; 3) others will not be harmed if a stay is issued; and 4) the public interest will not be harmed. See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)).

"The test is a flexible one." Population Institute v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986). Relief should be granted if a movant demonstrates "either a high likelihood of success and some injury, or vice versa." Id.,

citing Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985). An "absolute certainty of success" on the merits is not required. Id. Indeed, a stay should issue "even though [the Court's] approach may be contrary to movant's view on the merits," as long as the movant makes a substantial showing on the other factors. Washington Metropolitan Area Transit, 559 F.2d at 843.

Similarly, expedited review is appropriate where (i) the decision under review is subject to substantial challenge, and (ii) petitioners would suffer irreparable injury absent expedition. Handbook of Practice and Internal Procedures at 70, United States Court of Appeals for the District of Columbia Circuit. An additional, independently sufficient factor is whether "the public

generally . . . ha[s] an unusual interest in prompt disposition." Id.

Each of the criteria for a stay and for expedited review is easily satisfied here.

I. MCI IS LIKELY TO PREVAIL ON THE MERITS.

The principal legal issue in this case is whether the FCC properly exercised its authority under the new § 10 of the Communications Act, 47 U.S.C. § 10, to eliminate tariffs for all domestic interexchange services. Section 10 provides that the FCC may "forbear" from enforcing substantive requirements of the Communications Act if:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 10(a).

As will be shown, the order cannot be justified under § 10 for two reasons. First, the FCC's decision to impose mandatory (rather than permissive) detariffing goes beyond the limited authority conferred by § 10. Second, the FCC's decision that mandatory detariffing is consistent with the public interest lacks any reasoned foundation, and is thus arbitrary and capricious.

A. The Order Exceeds The FCC's Statutory Authority.

Section 10 confers upon the FCC the limited power to "forbear from applying any regulation or any provision" of the Act if particular conditions are met. § 10(a). In the

Order, however, the FCC went much further and adopted a mandatory detariffing policy which prevents carriers from complying with the § 203 tariffing requirement, regardless of the nature of the service, or the type of customer involved.

The word "forbear" has an ordinary, well-understood meaning: "refraining from action." See Black's Law Dictionary 329 (5th ed. 1983); Webster's Third International Dictionary 886 (1981) (same); Random House Dictionary 748 (2d Ed. 1987) (same). Thus, Congress gave the FCC only the authority to refrain from enforcing the mandates of the Act, including § 203's requirement that carriers must file tariffs. Congress did not give the FCC authority to prohibit carriers from relying on tariffs to order their affairs, especially with the millions of small customers

whose relationship with interexchange carriers is entirely premised on tariffs.

Acknowledging that its order goes far beyond the ordinary meaning of "forbear," the FCC argues that the term should be interpreted in accordance with the FCC's traditional use of word, which assertedly covers mandatory as well as permissive detariffing. See Order ¶ 71. When construing a statute, however, it must be assumed that the "legislative purpose is expressed by the ordinary meaning of the words used." Richards v. United States, 369 U.S. 1, 9 (1962). Thus, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1982). In this case, the ordinary meaning of the language at issue is not broad enough to encompass the FCC's reading. Nor

is there anything to indicate that Congress intended the language to mean anything other than what it ordinarily means. Thus, there was no statutory basis for the FCC's decision.

B. The Order Is Arbitrary and Capricious.

Quite apart from the absence of statutory authority, the Order lacks a reasoned justification. Indeed, the Order is hopelessly contradictory, and does not satisfy the requirement that agency action represent "a 'rational connection between the facts found and the choice made.'" Motor Vehicles Association Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., et al. 463 U.S. 29, 43 (1983), quoting Burlington Truck Lines v. U.S., 371 U.S. 156, 168 (1962).

The Order rests principally on the FCC's conclusion that mandatory detariffing satisfied the "public interest"

prerequisite to forbearance (§ 10(a)(3)), because any tariffing facilitates "price coordination in the interstate, domestic, interexchange market . . ." Order ¶ 44; see also Order ¶ 54 ("tacit coordination of prices for interstate, domestic, interexchange services, to the extent it exists, will be more difficult if we eliminate tariffs, because price and service information about such service provided by nondominant interexchange carriers would no longer be collected and available in one central location"). The FCC likewise relied on this rationale in finding that § 10's other prerequisites were met. See, e.g., Order ¶ 23 (discussing whether tariffs are necessary to ensure that charges are just, reasonable, and non-discriminatory, and finding that tariff filings "facilitate, rather than deter, price coordination, because under a tariffing regime, all rates and service information is collected in one, central location"); id. ¶ 37

(discussing whether tariffs are necessary to protect consumers, and finding that "'forbearance will promote competition and deter price coordination, which can threaten competitive benefits'"); id. ¶ 41 ("we believe that eliminating tariffs . . . will reduce [carriers'] ability to engage in tacit price coordination").

Indeed, the FCC justified its choice of mandatory as opposed to permissive detariffing (or true forbearance) based on the view that permissive detariffing "would not eliminate the collection and availability of rate information in one centralized location," and "would create the risk that carriers would file tariffs merely to send price signals and thus manipulate prices." Order ¶ 61.

Mandatory detariffing simply cannot be justified on this ground. To begin with, the FCC did not find that tariffs caused price coordination. Rather, it acknowledged

that "evidence of tacit price coordination in the market for interstate, domestic interexchange services is inconclusive." Order ¶ 23. More importantly, even if the risk of price coordination were real, the Order would do nothing to ameliorate it. The Order identifies tariffs as the means by which competitors can ascertain pricing information. Yet the FCC ordered carriers to continue to "make information on current rates, terms, and conditions for all of their interstate, domestic, interexchange services available to the public in an easy to understand format and in a timely manner." Order ¶ 84 (emphasis added). Indeed, the Order requires carriers to publicize the location and hours during which such information may be accessed. Order ¶ 86.

Thus, the order requires fully as much public disclosure of rates, terms and conditions as does the tariff regime it displaces. If disclosure risks price signalling and

collusion, that risk remains present despite the FCC's decision to detariff. The Order simply will not bring about the principal public policy benefit the FCC claims it will achieve. The only difference between the tariff requirements of § 203 and the public disclosure requirements of the Order is the location of the information. Pursuant to § 203, the information is located at the FCC. Pursuant to the Order, it is available at the carrier's offices. It is inconceivable that this difference could prevent the risks of collusion identified by the FCC. Certainly, such a dramatic and costly policy shift as mandatory detariffing cannot be supported by so slender a reed.

Nor do any of the other rationales articulated in the order survive scrutiny. The Order cannot be justified on the ground that tariffing "removes incentives for competitive price discounting." Order ¶ 53. According to the Order,

carriers will not bother to offer discounts because competitors will know immediately what discounts are offered and will match them before the discount has the effect of attracting new customers. See id. ¶ 45. This assumption is, however, contrary to the record. The FCC itself recognized that the "high churn rate among consumers of interstate, domestic interexchange carriers indicates that consumers . . . are likely to switch carriers in order to obtain lower prices or more favorable terms and conditions." Order ¶ 21. This rationale also suffers from the same fundamental problem discussed above -- if tariffing did provide a disincentive to offer discount programs because other carriers would learn of them and immediately match them, the Order's disclosure requirements would merely perpetuate the problem.

Nor can the Order be justified on the ground that tariffing precludes carriers from making rapid, efficient responses to changes in demand and costs. Order ¶ 53. This conclusion is inexplicable. Under the existing rules, carriers can file tariffs on one day's notice,. This allows them to alter service plans almost instantaneously in response to competition or other changes in the market. The Commission itself found, however, that in a non-tariffed world, carriers would, at a minimum, be required to provide some form of advance notice to the millions of consumers they serve before certain changes could be made to rate structures. See Order ¶ 56 (Carriers would "likely be required, as a matter of contract law, to give advance notice of" changes such as rate increases). Thus, the move from tariff to contract is certain to reduce carriers' flexibility -- not enhance it. In any event, this benefit could

have been fully achieved by adopting a permissive detariffing rule, which would allow carriers to decide when the cost of tariffing outweighed its administrative benefits.

The FCC also indicated that tariffing imposes costs on carriers that attempt to make new offerings, and that mandatory detariffing is therefore in the public interest. But absent tariffs, carriers will have to enter into new contracts with customers each time they make a new offering. The cost of doing so, which the Commission appears not to have considered, will far outstrip the cost of tariff filings. And, once again, this benefit could have been fully achieved by adopting a permissive detariffing rule.

Finally, the FCC made no serious attempt to deal with the issue of "casual calling." Casual callers are those who use a carrier's services without having an ongoing relationship with that carrier, such as credit card and collect

callers. Carriers cannot enter into contractual arrangements with casual callers prior to the time the call is actually made. Under a tariffed regime, that is not a problem -- the rates charged for calling card or collect calls, as well as the terms and conditions governing those calls, are contained in tariffs, and both the carrier and casual callers are bound by the tariff. Absent tariffs, however, there is no mechanism available to govern the rates, terms and conditions of the call. The FCC's offhand comment that by using a credit card and completing a call, "casual callers may be deemed to have accepted a legal obligation to pay for any such service rendered," Order ¶ 58 (emphasis added), does not begin to answer the question of what, as a legal matter, obligates these callers to pay carriers a specific rate for the services they use; what terms and conditions, such as

applicable liability limitations, govern the call; and what law answers these questions.

In short, the FCC's order does not survive even minimal scrutiny.

II. MCI AND OTHERS WOULD SUFFER IRREPARABLE HARM IF THE MANDATORY DETARIFFING ORDER IS NOT STAYED.

The Order mandates radical change in the way MCI and all other interexchange carriers do business. Presently, as a result of the Supreme Court's ruling in MCI Telecommunications Corp. v. AT&T, 113 S. Ct. 2223 (1994), all of MCI's domestic services to millions of customers are provided under tariff. During the period when the Commission's rules authorized permissive detariffing, the vast majority of MCI's customers received service under tariff because it was far more efficient to do so than to enter into individual contracts with each

customer. The Order will require MCI to establish individual contractual relationships with each of these customers, and to do so in a matter of months. That process risks irreparable harm to MCI in at least four distinct ways.

First, (as detailed in the Harker affidavit submitted herewith) the cost of compliance with the Order will be enormous. MCI alone is likely to incur costs that run to tens of millions of dollars even to establish contracts using standardized forms with its millions of customers and every other interexchange carrier would be put to the same expense. Specifically, MCI estimates that it will incur an expense of approximately $20 million in transaction costs to convert existing customers to contracts, and approximately the same amount to form contractual relationships with the approximately 16 million new

subscribers MCI estimates it will obtain in 1997. Harker Aff. ¶ 6. MCI also estimates that the need to use mailings rather than tariff amendments to effectuate changes in terms and conditions will cost approximately $48 million annually. Id. ¶ 7. MCI further estimates that customer support services for this conversion process will be approximately $11 million. Id. ¶ 8.

This harm is certain to occur imminently. Absent a stay, MCI will be required to begin the process of converting customers from tariffs to individual contracts in a matter of months in order to meet the Order's September 22, 1997 deadline for the complete elimination of tariffs. Harker Aff. ¶¶ 1, 5. Should the Order be invalidated, that expense would have been wholly unnecessary. Indeed, invalidation of the Order would impose on MCI a further cost of informing all its customers

that the contracts they previously received were no longer valid. Because these harms are both certain and great, they plainly warrant a stay. See Wisconsin Gas Co. v. FERC, 758 F.2d 669 (D.C. Cir. 1978). Furthermore, the harms are certain to fall on MCI (and other carriers) or their customers, or (as is most likely) both; In all likelihood MCI will be forced to absorb a substantial measure of the costs but higher rates for consumers will also result. Harker Aff. ¶ 11.

Second, the process of replacing tariffs with contracts will expose MCI and other carriers to an onslaught of litigation. To begin with, the Order has created tremendous uncertainty as to whether customer-carrier relationships will continue to be governed by uniform federal law, or will instead be governed by state law. On the one hand, as the Order makes clear, the

substantive requirements of §§ 201 and 202 of the Communications Act that interstate rates be just, reasonable and nondiscriminatory continue to apply, and will be enforced by the FCC in complaint proceedings authorized by § 208 of the Act. On the other hand, the Order repeatedly suggests that state contract and consumer protection law will henceforth govern carrier-customer relationships. E.g. Order ¶ 42.

The process of contract formation will itself raise many complicated questions. Under the law of many states, it is unclear whether MCI can form contracts with existing customers by virtue of a process that makes new contract terms binding if a customer continues to use MCI after receiving notice of the contract terms. Such a practice may be deemed an unlawful "negative option," necessitating that MCI terminate service and then restore it

only to customers who affirmatively request it. Many other unresolved questions about the scope of MCI's new state law duties will likewise be certain to prompt massive consumer class action litigation. MCI and other carriers should not be subjected to this burden in advance of a conclusive determination of the Order's validity.

Third, as demonstrated, the Order will prevent MCI from entering into contracts with a substantial class of customers -- casual callers -- which will severely disrupt an important aspect of its business.

Fourth, denial of a stay will cast a pall of uncertainty over the market, particularly with respect to large and mid-sized businesses with which MCI typically enters into special customer arrangements (SCAs). During the pendency of the appeal, it will remain unclear whether existing tariffed SCAs can continue to govern those

relationships, or whether existing SCAs must be renegotiated. It will be unclear whether the meaning and enforcement of the SCAs will be governed by federal or state law, and if the latter, which state's law. Because the Order forbids the filing of any new SCAs as of its effective date (¶ 90), all such relationships formed during the pending of the appeal will have to be contractual. Should the Order be invalidated, however, these contractual relationships could be found to be without legal effect. See American Broadcasting Companies, Inc. v. FCC, 643 F.2d 818 (D.C. Cir. 1980). Customers may refuse to pay, or, if they pay at all, may raise subsequent claims based on the statutory requirements of § 202(a) that rates be nondiscriminatory. Carriers would suffer enormous adverse consequences were they required to shift to contractual relationships en masse during the pendency of

the appeal, only to shift back to tariff relationships should they prevail.

III. NO OTHER PARTY WOULD HARMED BY THE GRANT OF A STAY.

No other party would be substantially harmed by the grant of a stay. The relationship between consumers and carriers has been governed by tariffs for over sixty years. For that same sixty years, the FCC has accepted and maintained tariff filings. It cannot seriously claim that it or the public would be harmed merely by maintaining the status quo -- a status quo mandated by the Communications Act -- until the question of the Order's lawfulness can be decided on the merits.

IV. THE PUBLIC INTEREST WOULD BE SERVED BY THE GRANT OF A STAY.

The public interest would be served by the grant of a stay. As discussed above, implementation of the Order

would impose significant costs on carriers that would likely be passed on to consumers. A stay preserving the status quo would prevent the confusion and added expense consumers may suffer if carriers are forced to move toward a detariffed environment -- confusion and expense which would be utterly needless if the Order is overturned on the merits. That is doubtless why an array of groups representing consumers supported MCI's request for a stay from the FCC.

CONCLUSION

For all the reasons stated above, the Order should be stayed pending review by this Court, and an expedited schedule should be established.

Respectfully submitted,

- S -

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Dated: January 6, 1997

United States Court of Appeals
For The District of Columbia Circuit

No. 96-1459 September Term, 1996

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
FILED FEB 13 1997

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents.

Competitive Telecommunications Association, et al.,
Intervenors

Consolidated with 96-1477, 97-1009

BEFORE: Ginsburg, Sentelle, and Tatel, Circuit Judges

APPENDIX C

ORDER

Upon consideration of MCI Telecommunications Corporation's motion for stay pending judicial review and for expedited consideration and a briefing schedule, the responses thereto, the replies, and the supplements; America's Carriers Telecommunication Association's motion for stay pending judicial review, the response thereto, and the reply; and the motion to hold in abeyance, the responses thereto, and the reply, it is

ORDERED that the motions for stay be granted. Petitioners have satisfied the stringent standards required for a stay pending court review. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Circuit Handbook of Practice and Internal Procedures 68-69 (1994). It is

FURTHER ORDERED that the motion to hold in abeyance be denied. It is

FURTHER ORDERED that the motions for expedition be granted in part. The Clerk is directed to calendar this case for oral argument early in the September 1997 Term. It is

FURTHER ORDERED, on the court's own motion, it appearing that these consolidated cases present potential problems of duplicative briefing, that the parties show cause within fifteen days of the date of this order why the following briefing format should not be adopted:

Joint brief of petitioners
(not to exceed 12,500 words)

Joint brief of intervenors in support of
petitioners (not to exceed 8,750 words)

Brief of respondents
(not to exceed 12,500 words)

Joint brief of intervenors in support of
respondents (not to exceed 8,750 words)

Joint reply brief of petitioners
(not to exceed 6,250 words)

Joint reply brief of intervenors in support of
petitioners (not to exceed 6,250 words)

The foregoing represents a *proposed* format. Those parties with no objection to it need not respond. Any responses to the order to show cause shall not exceed 20 pages. Objections to the format should be detailed and specific. The parties may also suggest an alternative briefing format to reduce the number of pages submitted to the court. In so doing, the parties should keep in mind that the court looks with extreme disfavor on repetitious submissions and will, where appropriate, require joint briefs.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: - S -
MaryAnne McMain
Deputy Clerk/LD